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No. 90-5844

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

TERRY FOUCHA,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Louisiana Supreme Court

MOTION OF THE AMERICAN PSYCHIATRIC ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF THE AMERICAN PSYCHIATRIC ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Founded in 1844, the American Psychiatric Association is the nation's largest organization of psychiatric physicians, with approximately 40,000 members The Association has participated as *amicus curiae* in numerous cases involving psychiatric issues, including *Washington v. Harper*, 494 U.S. 210 (1990); *Allen v. Illinois*, 478 U.S. 364 (1986); *Barefoot v. Estelle*, 463 U.S. 880 (1983); *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Estelle v. Smith*, 451 U.S. 454 (1981); *Parham v. J.R.*, 442 U.S. 584 (1979); *Addington v. Texas*, 441 U.S. 418 (1979); and *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

The issue in the present case—whether insanity acquittees may be indefinitely hospitalized on the basis of dangerousness alone—is of great concern to the Association and its members. Psychiatrists have primary responsibility for treating committed insanity acquittees and for maintaining a constructive, therapeutic hospital environment. They also have a more general interest in ensuring that involuntary psychiatric hospitalization be used only for the appropriate function of providing proper care and treatment to patients. The Louisiana statute for confining insanity acquittees jeopardizes these interests by allowing indeterminate hospitalization for people who are no longer mentally ill. Such an approach is at odds with the purpose of hospitalization and also erodes the legitimacy of involuntary commitment by transforming it into a discriminatory system of preventive detention. Consequently, both as advocates for their patients and in their own right, psychiatrists will be directly affected by the decision in this case. The Association also believes that it can provide scientific and clinical information that may assist the Court in its deliberations.

Petitioner has consented to the filing of this brief, but respondent has withheld its consent.

For these reasons, the American Psychiatric Association requests that its motion for leave to file the accompanying brief be granted.

Respectfully submitted,

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BRIEF OF THE AMERICAN PSYCHIATRIC ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The interest of the American Psychiatric Association is set out in its accompanying motion for leave to file this brief.

STATEMENT

This case involves a challenge to the Louisiana statutory scheme that permits an insanity acquittee who is no longer mentally ill to be committed indefinitely to a psychiatric hospital based on his dangerousness. The Louisiana Supreme Court affirmed the trial court's deci-

sions that petitioner Terry Foucha, an insanity acquittee, was dangerous and that his continued confinement under Louisiana law was constitutional.

1. In Louisiana, after a defendant is found not guilty by reason of insanity, the court is required to hold a hearing to determine if he should be committed to a psychiatric hospital. La. Code Crim. Proc. Ann., art. 654 (West Supp. 1991). The sole issue at the hearing is whether the defendant presents a "danger to others or to himself." *Ibid.*[1] The defendant has the burden of proof on that issue. *Ibid.* The commitment decision is not based on the defendant's mental condition.

Once an insanity acquittee has been committed for six months, he may initiate release proceedings annually, or the hospital superintendent may do so if he believes that the acquittee is no longer dangerous. La. Code Crim. Proc. Ann., arts. 655(A), (B) (West Supp. 1991).[2] In either event, the matter is referred to a review panel, which makes a written recommendation to the court regarding the acquittee's mental condition and whether he can be released "without danger to others or to himself." La. Code Crim. Proc. Ann., art. 655(A); *see also*

[1] The Louisiana Supreme Court defined "dangerous to others" as "the condition of a person whose behavior or significant threats support a reasonable expectation that there is a substantial risk that he will inflict physical harm upon another person in the near future," J.A. 34 (citing La. Rev. Stat. Ann. § 28:2(3)), and defined "dangerous to self" as "the condition of a person whose behavior, significant threats or inaction supports a reasonable expectation that there is a substantial risk that he will inflict physical or severe emotional harm upon his own person," *ibid.* (citing La. Rev. Stat. Ann. § 28:2(4)).

[2] When a person committed pursuant to article 654 is permitted to leave the hospital, he may be either discharged or released on probation subject to certain conditions. La. Code Crim. Proc. Ann., art. 654. We use the term release to include both "release" and "discharge."

La. Code Crim. Proc. Ann., art. 656(A) (West Supp. 1991).[3] Either the acquittee or the district attorney may also retain a physician to conduct an examination and submit a report to the court. La. Code Crim. Proc., art. 656(B) (West Supp. 1991).

If the review panel recommends that the acquittee be released, the court must hold a hearing, at which the sole issue is the acquittee's dangerousness. *Ibid.* If the panel recommends against release, the court has the option of continuing the commitment or holding a hearing to determine dangerousness. La. Code Crim. Proc. Ann., art 657 (West Supp. 1991). At the release hearing, the acquittee has the burden of proving that he is not dangerous. *Ibid.*

2. On October 12, 1984, petitioner Foucha was found not guilty by reason of insanity on one count of aggravated burglary and one count of illegal discharge of a firearm. He was committed to Feliciana Forensic Facility at Jackson, Louisiana, on April 30, 1985. In 1988, the superintendent of Feliciana, pursuant to article 655, recommended that Foucha be conditionally discharged. The review panel supported that recommendation, finding that there was "never any evidence of mental illness or disease since admission." J.A. 10.[4] The Criminal District Court then held a hearing on the recommendation, at which the only witness was Dr. Kenneth Ritter, a

[3] The review panel is comprised of "the person's treating physician, the clinical director of the facility to which the person is committed, and a physician or psychologist who served on the sanity commission which recommended commitment of the person. If any member of the panel is unable to serve, a physician or psychologist engaged in the practice of clinical or counseling psychology with at least three years' experience in the field of mental health shall be appointed by the remaining members." La. Code Crim. Proc. Ann, art. 655(A).

[4] Petitioner apparently suffered from "a drug-induced psychosis" at the time he committed the criminal acts that led to his insanity acquittal. J.A. 35.

court-appointed psychiatrist who had previously examined petitioner with respect to his insanity plea. Dr. Ritter testified that Foucha was not mentally ill.[5] He went on to testify, however, that he would not "feel comfortable in certifying that petitioner would not be a danger to himself or to other people." *Id.* at 18.[6] Finding that Foucha was a danger to others, the trial court continued his commitment. The court of appeal denied petitioner's application for review, with one judge dissenting. *Id.* at 25-26.

The Louisiana Supreme Court affirmed by a four to three vote. The majority first found that the trial court did not abuse its discretion in concluding that petitioner was dangerous. *Id.* at 34-36. The majority then rejected Foucha's argument that the Louisiana commitment statute violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The court ruled that the state's interests in protecting society and the individual are sufficient to incarcerate an insanity acquittee on the basis of dangerousness alone. *Id.* at 43-44. The court rejected *dicta* from two Fifth Circuit opinions that had reached a contrary conclusion with respect to Louisiana's statute (*Hopkins v. Lynn*, 888 F.2d 35, 37 n.2 (1989); *Francois v. Henderson*, 850 F.2d 231, 236 (1988)), and relied instead on cases involving other commitment statutes, *Hickey v. Morris*, 722 F.2d 543 (9th Cir. 1983), and *Harris v. Ballone*, 681 F.2d 225 (4th Cir. 1982).

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[5] The parties stipulated that if Dr. Medina, another court-appointed psychiatrist who had also examined petitioner with respect to his insanity defense, were called to appear, "his testimony would be essentially the same" as that of Dr. Ritter. J.A. 35-36.

[6] Dr. Ritter explained that Foucha essentially had an "anti-social personality." J.A. 15. He further stated that there was no cure for this condition and that it would not be helped by continued confinement at Feliciana. *Id.* at 19.

Justice Dennis dissented. Relying heavily on this Court's analysis in *Jones* v. *United States*, 463 U.S. 354 (1983), he argued that due process requires proof of both mental illness and dangerousness to justify confining an insanity acquittee in a psychiatric facility. J.A. 45-51. Justice Dennis also concluded that the Louisiana statute violates the Equal Protection Clause because, in contrast to the state's civil commitment law, it does not require that involuntary psychiatric hospitalization be premised on a finding of current mental illness. *Id.* at 50-51.

SUMMARY OF ARGUMENT

A fundamental tenet of our constitutional system is that "the government may not detain a person prior to a judgment of guilt in a criminal trial." *United States v. Salerno*, 481 U.S. 739, 749 (1987). While there are some recognized exceptions to that basic rule, the Louisiana system for confining insanity acquittees does not come within them. It is neither a legitimate form of psychiatric commitment nor a sufficiently limited, carefully tailored form of regulatory preventive detention. It should be struck down.

1. Involuntary psychiatric hospitalization is the major form of non-penal confinement in this country. Traditionally applicable to both civil committees and insanity acquittees, this unique system is based on the law's special relationship with the mentally ill. The presence of such an illness, when it is sufficiently debilitating, confers additional (*parens patriae*) authority on the state and also provides a constitutional basis for the imposition of psychiatric care and treatment during an indeterminate period of hospitalization. *See, e.g., Addington v. Texas*, 441 U.S. 418 (1979); *Jones v. United States*, 463 U.S. 354 (1983). Without a requirement of mental illness, however, the state's authority is correspondingly diminished and the constitutional basis for indeterminate psychiatric hospitalization is eliminated.

2. The indeterminate confinement of dangerous, nonmentally ill insanity acquittees cannot be justified as a legitimate form of regulatory preventive detention. Because of its potential for abuse, the use of such detention is "carefully limited" in our society. *United States v. Salerno*, 481 U.S. at 755. *See also Williamson v. United States*, 184 F.2d 280, 282 (2d Cir. 1950) (Jackson, J., Circuit Justice). It has been upheld only where there is a grave risk of immediate, serious harm and, even then, typically for a relatively brief period. *See, e.g., Ludecke v. Watkins*, 335 U.S. 160 (1948) (wartime detention of aliens); *United States v. Salerno*, 481 U.S. 739 (pretrial detention of individuals charged with especially serious crimes). The breadth of Louisiana's approach (*all* insanity acquittees) coupled with its duration (up to *lifetime* confinement) place it well outside these narrow exceptions. The statute also impermissibly discriminates against insanity acquittees by confining them until no longer dangerous, while convicted criminals are released at the end of their sentences regardless of dangerousness.

ARGUMENT

THE DUE PROCESS CLAUSE PROHIBITS THE INDETERMINATE PSYCHIATRIC HOSPITALIZATION OF INSANITY ACQUITTEES WHO ARE DANGEROUS BUT NO LONGER MENTALLY ILL.

Under our constitutional structure of government, "liberty is the norm" and its deprivation must generally be based on a criminal conviction. *United States v. Salerno*, 481 U.S. 739, 755 (1987). The principal exception to this rule has long been the system of involuntary psychiatric hospitalization for the mentally ill. Built upon a special *parens patriae* authority that supplements the state's more general police powers, the legitimacy of psychiatric commitment depends on the presence of mental illness. That factor provides the source of the state's added power and also justifies placing an individual in a

psychiatric hospital for an indefinite period of care and treatment. By excluding a mental illness requirement, therefore, the Louisiana scheme for confining insanity acquittees cannot be upheld on this traditional basis.

There is also a second, narrower exception to the general rule that deprivations of liberty must be based on a criminal conviction. Typically referred to as "regulatory preventive detention," this approach allows for confinement to protect society against immediate, substantial dangers, such as wartime espionage, highly contagious diseases and potential acts of violence by people awaiting trial on extremely serious charges. *Salerno*, 481 U.S. at 748-49. The Louisiana system cannot be justified under this rationale either, because it subjects all insanity acquittees to a regimen of lifetime preventive detention, a fate that even convicted criminals are spared.

A. The Constitutional Legitimacy of Involuntary Psychiatric Hospitalization for Insanity Acquittees Rests on the Presence of Mental Illness.

The government's use of a special system of psychiatric confinement traces its origins to early English law and practice. *See* Dershowitz, *The Origins of Preventive Confinement in Anglo-American Law, Part I: The English Experience*, 43 U. Cin. L. Rev. 1, 28-57 (1974). The approach first became formalized in this country through the adoption of commitment statutes soon after the advent of the insane asylum in the early nineteenth century. *See* Dershowitz, *The Origins of Preventive Confinement in Anglo-American Law, Part II: The American Experience*, 43 U. Cin. L. Rev. 781, 806-09 (1974). From their inception, these statutes have provided the basis for involuntarily hospitalizing civil patients and insanity acquittees. *See ibid.* Today every state has a comprehensive system for committing both groups. *See* S. Brakel, J. Parry & B. Weiner, *The Mentally Disabled and the Law* 114-26 (survey of civil commitment stat-

utes); 786-95 (survey of insanity acquittee commitment statutes) (Am. B. Found., 3d ed. 1985).

The cornerstone of this entire social structure is the presence of mental illness. That is so for several reasons. To begin with, the state's authority to establish a special system of psychiatric confinement ultimately must rest on the premise that "[o]ne who is suffering from a debilitating mental illness" is not "wholly at liberty." *Addington v. Texas*, 441 U.S. 418, 429 (1979). Otherwise, there would be no reason for the law to treat the mentally ill differently from everyone else. *Cf. Schall v. Martin*, 467 U.S. 253, 265 (1984) ("juveniles, unlike adults, are always in some form of custody"). The particular diminution of liberty caused by mental illness results from its disabling effects on cognition and behavior. Those effects are generally inconsistent with the basic assumptions about individual choice and control on which our system of liberty is constructed.

In view of these considerations, the presence of a debilitating mental illness has long provided the state with a source of constitutional power that is not usually available to it. Thus, while the state's authority to confine citizens in general derives solely from its police power, when dealing with the mentally ill the state may also rely on its *parens patriae* power, growing out of its historical role as "guardian of all infants, idiots and lunatics." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972) (quoting 3 W. Blackstone, *Commentaries* *47).

But even though the *parens patriae* power supports involuntary confinement, it is not a power that may be used "for the destruction of liberty"; it must instead serve a "beneficient function." *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 59 (1890). *See also Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (state has a "*parens patriae* interest in preserving and promoting the welfare of the child"). Consequently, regardless of whether psychiatric

commitment is intended to protect the individual or to protect society, *see Addington*, 441 U.S. at 426, its unifying purpose is "to treat the individual's mental illness." *Jones v. United States*, 463 U.S. 354, 368 (1983). By so doing, the state acts to help restore the mentally ill individual (so far as reasonably possible) to a condition where he is "wholly at liberty," *Addington*, 441 U.S. at 429, the absence of which justified his special confinement in the first place.[7]

This understanding of psychiatric commitment, in turn, explains the constitutional legitimacy of the characteristics that have customarily marked its "nature and duration." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). To begin with, the presence of mental illness justifies placing an individual in "an institution expressly designed to provide psychiatric care and treatment." *Allen v. Illinois*, 478 U.S. 364, 373 (1986). That factor likewise supports the state's use of "compulsory treatment" programs, which this Court has upheld as an appropriate constitutional incident of commitment. *Vitek v. Jones*, 445 U.S. 480, 492 (1980). *See also Washington v. Harper*, 494 U.S. 210 (1990) (involuntary medication may be used to protect the individual's "medical interests").

The state's adoption of a therapeutic system of confinement also justifies commitments of indeterminate duration. Thus, in recently holding that the Constitution does not restrict an insanity acquittee's confinement to the maximum sentence for the crime charged, this Court relied solely on the ground that "it is impossible to predict how long it will take for any given individual to

[7] According to a 1985 compilation, every state statute required a current mental illness for civil commitment and it appears that all but approximately ten statutes contained the same requirement for insanity acquittees. *See* S. Brakel, *supra*, at 114-26, 786-95. Three of those ten limited the duration of commitment to the maximum sentence for the crime with which the acquittee had been charged. *Id.* at 786-95. The federal statute for commitment of acquittees requires "a present mental disease or defect." 18 U.S.C. § 4243(e).

recover—or indeed whether he ever will recover." 463 U.S. at 368. *See also Allen v. Illinois*, 478 U.S. at 373 (indeterminate commitment of sex psychopath is based on state's interest in "treating rather than punishing sexually dangerous persons"). Concomitantly, as the Court further recognized in *Jones*, a "committed acquittee is entitled to release when he has recovered his sanity *or* is no longer dangerous." 463 U.S. at 368 (emphasis supplied).[8]

Departing from the traditional approach to psychiatric commitment, Louisiana seeks to preserve all of its features except for the mental illness requirement. But in the absence of that requirement the state no longer has a reason—it simply has an excuse—for confining people in a hospital: thus, while maintaining the form of a psychiatric commitment scheme, the substance of Louisiana's approach is pure preventive detention. In that circumstance, the use of a psychiatric hospital worsens the deprivation of liberty suffered by an individual. As this Court has previously held, for someone who is not mentally ill "the loss of liberty produced by an involuntary commitment is *more* than a loss of freedom from confinement." *Vitek v. Jones*, 445 U.S. at 492 (emphasis supplied). Moreover, absent mental illness, confinement for an indefinite period can no longer be justified on the ground that "it is impossible to predict how long it will take for any given individual to recover." *Jones*, 463 U.S. at 368. In short, contrary to the Louisiana Supreme Court's suggestion, there is no constitutional likeness between a system of "therapeutic confinement" for the mentally ill, *id.* at 369 n.19, and a system that confines a person who may "be dangerous because of factors in his personality

[8] This conclusion was not based, as the Louisiana Supreme Court supposed, on an "interpretation of the pertinent statutory law in the District of Columbia." J.A. 36 n.11. Rather, it was an integral part of the *Jones* Court's application of due process principles, expressly relying on *Jackson v. Indiana*. *See* 463 U.S. at 368.

and background other than mental disease." J.A. 40 n.13 (quoting Model Penal Code, commentary to § 4.08 at 259 (1985)).[9]

In sum, having unmoored its statute from the constitutional structure that traditionally supports involuntary commitment, Louisiana must locate the system's legitimacy elsewhere. In so doing, it may no longer rely on any special power applicable to the mentally ill. Nor, of course, can any portion of the acquittee's confinement be supported as punishment. *See Jones*, 463 U.S. at 369 ("as he was not convicted, he may not be punished"). All that remains, therefore, is the state's authority to employ a system of regulatory preventive detention, solely for the benefit of society and at the expense of the individual's liberty.[10] In no event could such a system legitimately confine people in a psychiatric hospital. For that reason alone, the Louisiana statute is invalid. In addition, as we now show, the State's use of indeterminate preventive detention for all insanity acquittees is impermissible no matter where they are confined.

[9] Curiously, the Model Penal Code recommends that the confinement of acquittees be based on dangerousness alone even as it acknowledges that "[c]onstitutional doubts also exist about the criterion of dangerousness," and notes that, at least in certain circumstances, "it is difficult to explain why society may continue to commit [the acquittee] due to his dangerousness if it cannot do the same to other persons." Am. L. Inst., Model Penal Code and Commentaries, commentary to § 4.08 at 260 (1985). *Compare* A.B.A., Criminal Justice Mental Health Standards § 7-7.4 (1984) (acquittee must be "currently mentally ill").

[10] Although the Louisiana statute also authorizes confinement for someone who is a danger to self, J.A. 39-44, that justification could not possibly support indeterminate commitment for an individual who is not mentally ill. The use of a "danger to self" criterion is simply a legacy of the traditional psychiatric commitment approach that the State has now abandoned.

B. Insanity Acquittees May Not Be Indefinitely Confined Solely Because They Are Unable to Prove That They Are No Longer Dangerous.

In our society the state's authority to deprive an individual of liberty for the sole purpose of "preventing danger to the community" is "carefully limited." *Salerno*, 481 U.S. at 747, 755. *See Williamson v. United States*, 184 F.2d 280, 282 (2d Cir. 1950) (Jackson, J., Circuit Justice) (preventive detention is "difficult to reconcile with traditional American law"). The primary, if not only, reason for this traditional limitation on state power would appear to be that accurate predictions of criminal behavior are difficult to make. Thus, while it may not be "impossible to predict [such] behavior," *Schall v. Martin*, 467 U.S. at 279 (internal quotes omitted), there is simply no way to do so with anywhere near the level of confidence required, for example, to sustain a criminal conviction—*i.e.*, beyond a reasonable doubt. *See Jones*, 463 U.S. at 378-81 (Brennan, J., dissenting) (summarizing social science literature on prediction of dangerousness). Consequently, as Justice Jackson has observed, "[i]mprisonment to protect society from predicted but unconsummated offenses is . . . fraught with danger of excesses and injustice." *Williamson*, 184 F.2d at 282.

Despite these general concerns, however, there are several circumstances in which the Court has determined that the constitutional balance tips in favor of allowing preventive confinement: during times of war or civil insurrection, *e.g.*, *Ludecke v. Watkins*, 335 U.S. 160 (1948); *Moyer v. Peabody*, 212 U.S. 78 (1909); in the immigration and deportation contexts, *e.g.*, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Carlson v. Landon*, 342 U.S. 524, 537-42 (1952); when there is an outbreak of a highly contagious disease, *cf. Jacobson v. Massachusetts*, 197 U.S. 11 (1905); and in the pretrial context, *see Salerno*, 481 U.S. 739; *Schall*, 467 U.S. 253.

Collectively, these cases suggest that the legitimacy of preventive detention depends on an analysis of three factors: the degree of the potential harm; the likelihood of its occurrence; and the duration of confinement required to prevent it. Thus, for example, the potential harm from wartime espionage is uniquely great and therefore supports even lengthy detention despite the likelihood of overprediction, a point explicitly recognized in the Constitution. *See* U.S. Const., art. 1 § 9 (writ of habeas corpus may be suspended in cases of rebellion or invasion). By contrast, in *Salerno*, the potential harm, while serious, was of a different order of magnitude. The Court thus stressed the relatively brief period of federal pretrial detention and the fact that Congress had selected persons charged with a small group of "extremely serious offenses," where the risk of harm through release is "far more likely" than it is for the general run of people charged with crimes. 481 U.S. at 747, 750. *See also Schall*, 467 U.S. at 263-74 (17-day pretrial detention; state has special *parens patriae* interest with respect to juveniles).

Measured against these criteria, the Louisiana statute must be found wanting. Far from being carefully limited, the statute applies to every insanity acquittee, regardless of the felonious act that he committed—be it uttering a false check or murder. *Cf. Solem v. Helm*, 463 U.S. 277, 290 (1983) ("criminal sentence must be proportionate to the crime for which the defendant has been convicted"). That particular statutory sweep is based on no legislative finding—and common sense suggests there could be none—that an undifferentiated group of insanity acquittees is uniformly or highly likely to "inflict physical harm upon another person in the near future." J.A. 34 (citing La. Rev. Stat. Ann. § 28:2(3) (standard for danger to others)). Nevertheless, each member of this group faces a system of lifetime indeterminate confinement. In short, the two factors heavily

relied on in *Salerno*—a careful legislative finding of special dangerousness, coupled with a brief period of detention—both cut in precisely the opposite direction here.

Finally, the Louisiana statue has the added vice of discriminating against insanity acquittees for no legitimate reason. Thus, a convicted individual is released at the end of his sentence without any inquiry into dangerousness. *See Powell v. Texas*, 392 U.S. 514, 529 (1968) (plurality opinion) ("[o]ne virtue of the criminal process is . . . that the duration of penal incarceration typically has some outside statutory limit"). But if that same individual is *acquitted* by reason of insanity, his release is conditioned on his ability to disprove dangerousness, a determination that, if made against him in the trial court, is unlikely to be disturbed as an abuse of discretion on appeal. *See* J.A. 36. Although that kind of distinction was upheld in *Jones*, the basis for the Court's decision was the presence of mental illness, *see* 463 U.S. at 368-69, a consideration that is not applicable here.

Nor can Louisiana's discriminatory treatment of insanity acquittees be supported by the notion that, as a group, they are even more dangerous than convicted felons. Aside from the fact that the State has nowhere advanced that position, such a suggestion seems highly unlikely. If anything, the available data support the opposite view. In a recent study, based on two groups of 127 carefully matched acquittees and convicts, the authors found that, five years after release, the acquittees had a rearrest rate of 54.3% whereas the comparable rate for prisoners was 65.4%. *See* Silver, *et al.*, *Follow-up After Release of Insanity Acquittees, Mentally Disordered Offenders, and Convicted Felons*, 17 Bull. Am. Acad. Psychiatry & L. 387, 396-97 (1989).[11]

[11] The two groups studied were virtually identical in terms of significant characteristics: average age (31); gender (all male); marital status; and criminal offense that led to the conviction or insanity acquittal—murder (29.9%); assault (31.5%); rape (8%); robbery (9.5% and 8.7%); property offenses (17.2% and 17.3%); and other (4% and 3.1%). Silver, *et al.*, *supra*, at 391-92.

Moreover, the average number of rearrests per prisoner (2.1) was substantially higher than that for acquittees (1.3). *Id.* at 394-95. And the prisoners were rearrested for more serious offenses: 46.7% compared to 33.8% for murder, rape, arson and serious assault. *Id.* at 395. These data further underscore the arbitrariness of Louisiana's selective use of indeterminate preventive detention for insanity acquittees.

CONCLUSION

The judgment of the Louisiana Supreme Court should be reversed.

Respectfully submitted,

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